IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.12.2007

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

W.P.No.36549 of 2002

R.Elanchizhian ... Petitioner

vs.

1. The Secretary to Government,
State of Tamil Nadu,
Prohibition and Excise,
Fort St. George, Chennai.

2. The Coimmissioner,
Prohibition and Excise,
Chepauk, Chennai-5.

3. The Assistant Commissioner,
Prohibition and Excise,
Madurai.

4. The District Collector,
Madurai District, Madurai. ... Respondents

Writ petition is filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorarified Mandamus, to call for the records from the files of the fourth respondent in reference Roc.No.81221/2002, dated 04.09.2002, quash the same and further direct the respondents to return the three Demand Drafts for a total sum of Rs.3,00,000/- (Rupees three lakhs only) drawn and submitted by the petitioner to get licence to conduct a liquor retail vending shop at Therkutheru, Madurai District.
For Petitioner : Mrs.Hema Sampath (SC)
for K.Kalyanasundaram

For Respondents : Mr.A.Arumugam,
Additional Government Pleader

O R D E R

The petitioner has sought a Writ of Mandamus to quash the order of the fourth respondent, dated 04.09.2002 and for a direction to the respondents to return three Demand Drafts for a total sum of Rs.3,00,000/- (Rupees three lakhs only) drawn and submitted by him to get licence for conducting a liquor retail vending shop at Therkutheru, Madurai District.

2. Brief facts leading to the Writ Petition are as follows:
The petitioner applied for grant of licence for retail vending at Therkutheru, Madurai District and

submitted an application along with three demand drafts for Rs.3,00,000/-. Due to filing of a batch of Writ Petitions by the existing licencees before this Court, the draw of lot for sale of privilege was not held as per the original schedule. After the disposal of the Writ Petitions by this Court and the Special Leave Petition by the Hon'ble Supreme Court, auction for the Excise year 2001-02 was fixed on 02.09.2002. Earlier, the authorities did not inform the minimum off-take to be lifted by the licencees before the sale of privilege and therefore, the Writ Petitions were filed against the action of the Government. The same position existed for the licence year 2002-03 also. Pursuant to the judgment of the Supreme Court in S.L.P.(C) No.14735 of 2002, the authorities insisted the licencees to give an undertaking to lift a minimum off-take for the Excise year 2002-03.

3. It is further submitted by the petitioner that for the shops situated within Madurai Corporation Limit, where population is more than 20 lakhs, the authorities have fixed the minimum off-take, lesser than the minimum off-take fixed for Therkutheru Village Panchayat. As the minimum off take fixed was higher and realising the consequences that in the event of failure to lift the minimum off-take, the authorities would proceed for cancellation of the licence and recovery of loss, the petitioner has submitted a letter dated 02.09.2002 to the respondents 2 and 3 to return the Demand Drafts for the value of Rs.3,00,000/-. Since the petitioner was the sole applicant for the shop at Therkutheru, even without conducting a draw, he was selected as licencee for the above said shop. On 03.09.2002, the petitioner sent a fax message to the Commissioner of Prohibition and Excise, Chennai, secomd respondent herein, requesting him to return the Demand Drafts. On the same day, the petitioner received an order, dated 02.09.2002, confirming his selection for the grant of licence to Therkutheru shop and he was directed to pay the balance fee and security deposit of Rs.1,00,000/- to the Department. On the next day, i.e., on 04.09.2002, the petitioner sent a detailed letter to the respondents, explaining the circumstances, warranting him to withdraw the draw. However, without properly appreciating the facts and circumstances of the case, the District Collector, Madurai District, fourth respondent rejected his request for the return of Demand Draft for Rs.3,00,000/- and ordered forfeiture of the amount to the Government. Aggrieved by the same, the petitioner has filed the present Writ Petition for the relief as stated above.

4. Respondents 3 and 4 in their counter affidavit submitted that the petitioner, being a resident of Keelavalavoo, Melur Taluk, Madurai District, has applied for allotment of IMFL shop for the Excise year 2002-03, duly enclosing the Demand Draft for the value of Rs.3,00,000/-. The Commissioner of Prohibition and Excise, Chennai, the second respondent herein, in his letter No.(P& E) IX (1) 16131/2002, dated 30.08.2002 ordered to give privilege to sell liquor through lot, in which, the petitioner was selected as a successful bidder. The Government had fixed a target for minimum off-take for every shop and the target fixed was intimated to all the applicants, who wanted to obtain the privilege of sale of liquor. Accordingly, the Sale Officer, Madurai, notified the minimum off take in respect of shop in Therkutheru Village, Melur Taluk and the right of privilege to sale of liquor was granted to the petitioner with a direction to remit the balance amount, vide District Revenue Officer's Proceedings ROC.No.56862/02/XI, dated 02.09.2002. On receipt of the order, on 03.09.2002, the petitioner filed objections to return the Demand Drafts deposited by him, stating that the minimum off-take fixed for the IMFL shop in Therkutheru could not be achieved by him in that location.

5. The respondents have further submitted that as there was failure to remit the privilege amount, the Additional Divisional Excise Officer, Madurai, in his report dated 04.09.2002 has recommended for taking action in accordance with G.O.Ms.No.115 (Prohibition and Excise), dated 22.06.2001 for the failure to remit the balance of privilege amount, as required under Rule 13(5) of the Tamil Nadu Liquor (Retail Vending) Rules, 1985. On the basis of the report of the Additional Divisional Excise Officer, Madurai, the Revenue Divisional Officer, Madurai has ordered forfeiture of the amount deposited by the petitioner. It is further submitted by the respondents that the Sale Officer has

conducted a lot on 02.09.2002 and before drawal of lot, the licencees were intimated about the minimum off-take for each shop in January 2002. According to them, as per the amended Tamil Nadu Liquor (Retail Vending) Rules, 1989, Paragraph 9 reads as follows:
"If a selected applicant does not make an application for grant of licence in conformity with sub rule (7), the privilege amount remitted by him shall be forfeited to the Government without any notice to the applicant. The shop shall be re-notified for grant of privilege."

In these circumstances, the respondents have submitted that the order of Revenue Divisional Officer, Madurai, is in order and the petitioner is not entitled to refund of amount deposited by him.

6. Mrs.Hema Sampath, learned Senior Counsel appearing for the petitioner submitted that it is a strange case where the Government had fixed higher quantity of minimum off-take of liquor without considering the population of Therkutheru Village Panchayat, which was only 5,000 when the shop was notified for the grant of privilege . She further submitted that the minimum off take fixed by the respondent was displayed only on 02.09.2002, just before the draw had taken place and immediately thereafter, the petitioner submitted a letter dated 02.09.2002 to the District Collector and Assistant Commissioner, Respondents 3 and 4, objecting the higher fixation of minimum off-take, for the above said shop and requested them to return the Demand Drafts. She further submitted that as the quantity fixed by the Government was beyond the reach, the petitioner cannot be compelled to pay the balance amount for obtaining the licence.

7. Referring to the contents of the impugned order, dated 04.09.2002, learned Senior counsel submitted that the off-take target fixed shop-wise in Madurai District was received from TASMAC through E-Mail on 02.09.2002 and it was published in the Notice Board just before the drawal of lot and therefore, when the petitioner submitted a letter dated 02.09.2002, before confirmation of auction, to refund the Earnest Money Deposit, the respondents ought to have refunded the same. She further submitted that the respondents have not denied the contentions that the existing licencees in the batch of Writ Petitions had challenged the notification for fresh licence for 2002-03 and since this Court had stayed for the issuance of licence, the Government did not sustain any loss in respect of Shop at Therkuthuru. Finally, placing reliance on the unreported judgement in W.P.No.36906 of 2003, dated 05.08.2003, she submitted the forfeiture of Earnest Money Deposit is illegal and liable to be refunded.

8. On the contrary, Mr.A.Arumugam, learned Additional Government Pleader, reiterating the contentions made in the counter affidavit, submitted that the petitioner applied for grant of privilege of IMFL shop in Therkuthuru village for the Excise year 2002-03 duly enclosing the Demand Draft for Rs.3,00,000/- and that on receipt of the information from TASMAC, Chennai, before the drawal of lot, all the licencees were intimated about the minimum off-take for the shop within the Madurai District. He further submitted that the Sale Officer, allotted the notified shop in "Therkkutheru" to the petitioner with a direction to remit the balance of privilege amount and submit a declaration with regard to liftment of minimum off-take. Referring to G.O.Ms.No.115, Prohibition and Excise, dated 22.06.2001 and Rule 13(5) of the Tamil Naud Liquor (Retail Vending) Rules, 1985, he submitted that the petitioner is not entitled to refund the balance amount as per the existing Rules and therefore, prayed for dismissal of the Writ Petition.

9. Before adverting to the facts of the case, it is relevant to extract the provision for the grant of licence under the Amended Tamil Nadu Liquor (Retail Vending) Rules, 1989. Rule 13 of the Rules is extracted hereunder:
"13. Application for the grant of privilege and licence:- (1) Any person interested in getting the privilege for retail vending of Indian Made Foreign Liquor in an area shall make an application in Form VI to the licensing authority along with the following:-

(i) A Demand Draft for an amount equivalent to one third of the privilege amount fixed for the shop, drawn on a nationlised bank favouring the Collector of the district.
(ii) A Demand Draft for Rs.500/- (Rupees five hundred only) towards application fee drawn on a nationalised bank favouring the Collector of the district:
Provided that separate application shall be made for grant of privilege for shops in each notified area.
(2) When the number of eligible application does not exceed the number of shops notified for an area, all applications shall be selected for grant of privilege. When the number of applications in respect of the shops in a notified area is more than the number of shops in that area, the selection of applicant for grant of privilege shall be decided by drawal of lot by the licensing authority in the presence of the Collector and the applications who prefer to be present.
(3) Where the number of applications received for a notified area is less than the number of shops in that area or where no application is received for a notified area, such shops in that area shall be re-notified for grant of privilege by the Collector.
(4) The selected applicant shall be intimated in writing about his selection. The selected applicant shall remit the remaining two third of the privilege amount and the license fee of Rs.5,000/- (Rupees five thousand only) on the day itself either in cash or by way of demand Draft drawn on any nationlised banks favouring the Collector of the district or partly in cash and partly by Demand Draft.
(5) If the sleeted applicant fails to remit the amount specified under sub-rule (4), the privilege amount paid under sub-rule(1) shall be forfeited to the Government and the shop shall be re-notified for grant of privilege.
(6) The Demand Drafts towards one third of the privilege amount paid under sub-rule (1) by an applicant shall be returned to him immediately, if he is not selected for grant of privilege.
(7) Where the selected applicant is intimated about his selection and after payment of privilege amount and the licence fee under sub-rule (4), he shall select a suitable building confirming to rule 18, within the notified area, for locating the shop and shall apply in Form VI-A to the licensing authority, within seven days from the date of receipt of such intimation. An affidavit sworn in before a Notary Public shall be filed by him to the effect that he is the owner of the building or holder of lease of the building and that the validity of lease is co-terminus with the period of licence applied for. If, on a later date, it is found that the affidavit is false, the privilege and the licence granted shall be cancelled and the licensee will also be liable for other legal action and the shop shall be re-nofied for grant of privilege.
(8) On receipt of the application for licence along with the required documents in conformity with sub-rule (7), the licensing authority shall grant licence in Form VII, within three days from the date of receipt of such application.
(9) If a selected applicant does not make an application for grant of licence in conformity with sub-rule (7), the privilege amount remitted by him shall be forfeited to the Government without any notice to the applicant. The shop shall be re-notified for grant of privilege.
(10) Where the shops are re-notified under these rules the provisions of rule 5 and this rule shall be followed.
(11) The period of licence shall be for the period ending with the 31st of July of the succeeding year, unless otherwise specified in the licence issued in a particular case."

10. In Hari Shanker v. Deputy Excise and Taxation Commissioner reported in 1995 (1) SCC 737, the Supreme Court at Paragraph 16, held as follows:
"The announcement of conditions governing the auctions was in the nature of an invitation to an offer to those who were interested in the sale of country liquor. The bids given in the auctions were offers made by the prospective vendors to the Government. The Government□s acceptance of those bids was the acceptance of willing offers made to it. On such acceptance, the contract between the bidders and the Government became concluded and a binding agreement came into existence

between them.... The powers of the Financial Commissioner to grant liquor licences by auction and to collect licence fees through the medium of auctions cannot by writ petitions be questioned by those who, had their venture succeeded, would have relied upon those very powers to found a legal claim. Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract could ever have a binding force.

11. In State of Haryana v. Lal Chand reported in 1984 (3) SCC 634, the Supreme Court considered as to whether the grant of exclusive licence of liquor vending by auction/sale in exercise of statutory power gives rise to a contract of statutory nature, distinct from that executed under Article 299(1) of the Constitution of India and at Paragraph 12, held as follows:
"The statutory duties and liabilities arising on acceptance of the bid at a public auction of a liquor contract may be enforced in accordance with the statutory provisions and that it was not a condition precedent for the recovery of an amount due under Section 28 of the Act, that the amount due and recoverable should be under a formally drawn up and executed contract. This is in recognition of the principle that the provisions of Article 229(1) of the Constitution are not attracted to the grant of such a privilege to vend liquor under the Act."

12. The above said judgments of the Supreme Court were followed by this Court in State of Tamil Nadu v. V.Subramaniam reported in 1996 (2) MLJ 487, and this Court held that, once the bid offered by a person at an auction sale is accepted by the competent authority, a completed contract comes into existence. A formal written contract as per Art.299(1) of the Constitution of India, is not necessary.

13. In W.P.No.36906 of 2003, dated 05.08.2003, this Court, on perusal of the materials placed on record and in the absence of positive assertion in the counter affidavit that the petitioner therein was a selected candidate for grant of privilege in terms of Tamil Nadu Liquor (Retail Vending) Rules, 1989, set aside the order of forfeiture. Further, though the petitioner therein had remitted 50% of the privilege amount as per the Notification, the auction was postponed due to filing of the Writ Petitions by the existing licencees and before the shop was auctioned, the petitioner therein had withdrawn the application and sought for refund.

14. In the case on hand, the petitioner had participated in the drawal of lot for privilege for IMFL shop at "Therkkutheru" and paid the Earnest Money Deposit, knowing fully well the terms and conditions of the auction notice and the Sale Officer by his order dated 02.09.2002, had accepted the bid and directed the petitioner to remit the balance of privilege amount, security deposit immediately. The Sale officer had further directed the petitioner to apply for licence within 7 days, failing which, the Earnest Money Deposit would be forfeited.

15. The recitals in the letter dated 02.09.l2002 addressed to the respondents 3 and r are extracted hereunder:
",d;W (02/09/02) Fyf;fy; eilbgWk; bghGJ FwpaPL rk;ge;jkhd jfty; fpilj;jJ/ mjpy; FwpaPl;od; mst[khefuhl;rp filfisf; fhl;oYk; mjpfkhf cs;sjhy; mjdhy; v;didj; jptu ntW ahUk; fy;eJ bfh;sshjjhy; vdf;F kJghdf;fil cWjp bra;ag;gl;lJ/ ,d;W (02/09/02) fhiy Fyf;fypd; nghJjhd; bjhpate;jJ/ ,jw;F Kd;g[FwpaPl;L mst[bjhpahJ/ vdnt ehd; brYj;jp cs;s (okhz;l; ouhg;l;) tiunahiy bjhifia vdf;F jpUk;g tH';FkhW gzpt[lk; nfl;Lf; bfhs;fpnwd;/ nkYk; vdf;F tH';fpa Ch;$pjj;ij uj;J bra;J vdJ (okhz;l; ouhg;l;) tiunahiyia jpUk;g tH';FkhW gzpt[lk; nfl;Lf; bfhs;fpnwd;/"

It is clear from the admission of the petitioner that he was selected in the draw held on 02.09.2002. When the offer made by the respondents had been accepted by him, the contract comes into existence between the parties and it is not open to the petitioner to wriggle out of the contractual

obligation latter on.

16. The decision in W.P.No.36906 of 2003, relied on by the learned Senior Counsel appearing for the petitioner, is not applicable for the reason that in the above case, though the bidder had remitted 50% of the privilege amount, he had withdrawn his application for the grant of privilege before the auction took place. But in the case on hand, the selection has been finalised on 02.09.2002 and the petitioner is also aware of the same and that the competent authority had also issued appropriate orders.

17. As per the conditions of auction notification and the amended Tamil Nadu Liquor (Retail Vending) Rules, if a selected candidate does not make an application for grant of licence, in conformity with Sub-Rule 7, the privilege amount shall be forfeited to the Government without any notice to the petitioner. The shop shall be re-notified for the grant of privilege. As the forfeiture of Earnest Money Deposit is consequential, it is immaterial, whether the State has suffered any loss due to the failure in not remitting the balance privilege and other amounts, as per the concluded contract. The impugned order does not indicate as to whether the existing licencees had preferred any Writ Petition challenging the notification in respect of IMFL shop for which the petitioner had remitted the part of the privilege amount nor the petitioner has filed any supporting document. Therefore, the contentions of the petitioner raised in Ground G of the affidavit is not tenable.

18. As the contract between the parties had come into existence on 02.09.2002 itself, I am of the considered view that the petitioner is not entitled to the refund. In the result, the Writ Petition is dismissed. No costs.

06.12.2007
Index: Yes/No
skm
To
1. The Secretary to Government,
State of Tamil Nadu,
Prohibition and Excise,
Fort St. George, Chennai.

2. The Coimmissioner,
Prohibition and Excise,
Chepauk, Chennai-5.

S. MANIKUMAR, J.
skm

3. The Assistant Commissioner,
Prohibition and Excise,
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4. The District Collector,
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